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No. 95-977

In The

Supreme Court of the United States

October Term, 1995

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE PETITIONER IN OPPOSITION TO DISMISSAL OF WRIT

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I. Introduction.

The statute, § 104(a)(2), as amended, remains ambiguous. In their decisions regarding this statute, the courts have embedded in our law an impermissible "default rule" to override the intent of Congress found in extrinsic evidence. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 5-10; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 8-19; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 7-8.) The illogical interpretation that finds two tests from that ambiguous language is the current and controlling interpretation for this statute, as amended. This illogical interpretation remains uncorrected for future application to the statute. The grievous harm done to our system of statutory interpretation to arrive at these impermissible and illogical rules remains unrepaired.

The 1996 Amendment of § 104(a)(2) has resolved none of the fundamental questions and cleansed none of the errors. Each of the fundamental questions posed in this case (What is the nature of ambiguity? How must and how may that ambiguity be resolved? What is the proper hierarchy and application of the methods of statutory interpretation with regard to this federal statute? What is the test posed by the language of this statute?) remain as fresh and pertinent after the 1996 Amendment as when *certiorari* was granted on March 25, 1996.

II. Court Did Not Lack Foresight in Granting Certiorari on March 25, 1996.

The Solicitor General seems to suggest that because there has been a change in the law since *certiorari* was

granted that the decision to grant *certiorari* was improvident, that is, lacking foresight. The Solicitor General acknowledges that there has been no change in the law that relates to the facts of this case. The only new development is a new amendment to § 104(a)(2). The statute, as amended, remains ambiguous.[1] It would have been improper for the Court to refuse to hear an otherwise appropriate case based solely on the speculation that Congress might enact a future law that would change prospectively the outcome on these facts. There was no lack of foresight in granting *certiorari* on March 25, 1996.

III. Interpretation of § 104(a)(2) Remains Justiciable and Highly Relevant

A. Fairness and Justice

The question the Solicitor General should pose and the question which must be answered is whether once *certiorari* has been granted, withdrawal of the grant of the *writ* is an appropriate consequence of a change in the law that operates prospectively only. As the Solicitor General has stated, the question of exclusion of these punitive damages is not resolved by the 1996 Amendment and so the outcome of the case remains highly significant to many taxpayers whose cases are currently awaiting the outcome of this review. (E.g., *Bagley v. Commissioner*, 105 T.C. 396 (1995), appeal pending, No. 96-1768 (8th Cir.) (stayed pending outcome of Cert. Nos. 95-966 and

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[1] The new amendment is competent evidence of Congress' conviction that the prior statute (§ 104(a)(2)) excluded punitive damages, for there is no need to change a statute that already prohibits the exclusion to punitive damages.

95-977); *Birchenough v. United States*, No. 96-1323-JTM (D. Kan.); *Brothers v. United States*, No. 95-1240-MLB (D. Kan.); *Dallas Autery v. Commissioner*, No. 10903-96 (TC) (stayed pending outcome of Cert. Nos. 95-966 and 95-977); *Kari Lane v. United States*, No. 95-6320 (10th Cir.) (stayed by agreement pending outcome of Cert. Nos. 95-966 and 95-977); *Miller v. United States*, No. 96-1324-WEB (D. Kan.) and *Terrance A. and Virginia K. Johnson v. Commissioner*, No. 1786-96 (TC) (stayed pending outcome of Cert. Nos. 95-966 and 95-977.) To deny those taxpayers application of the proper law after *certiorari* has been granted, only because Congress later changed the law for others is unjust and incomprehensible to all but the most sophisticated minds. This Court should retain this case for justice and fairness and the perception of justice and fairness, if for no other reason.

B. Rationale for Granting Certiorari Unchanged

While Congress has added a limit to the exclusion, the original reasons for granting *certiorari* still exist in the amended statute.

i. Default Rule.

Courts have applied a "default rule" upon the finding of an ambiguity in the words of the statute. *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990), 90-2 USTC ¶ 85,713 (1990); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994), 94-1 USTC ¶ 50,232 (Fed. Claims 1994); *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995), 94-1 USTC ¶ 50,130, *reh'g denied*,

1995 U.S. App. Lexis 12,574; and *O'Gilvie v. United States*, 66 F.3d 1550 (10th Cir. 1995), 95-2 USTC ¶ 50,508. This "default rule" requires that the "intent of Congress" found in extrinsic evidence be disregarded to find in favor of the government. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 5-10; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 3, 8-19; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 7-8.) The flaw in these decisions is precisely this: The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that clear intent to exclude is evidenced. This "default rule" remains the controlling law for § 104(a)(2), as amended and by implication, for all federal statutes that carve out a benefit for citizens and taxpayers. See *C.I.R. v. Schleier*, 515 U.S. ___, 115 S.Ct. 2159, 95-1 USTC ¶ 50,309 (1995). Nothing in the 1996 Amendment changes this improper rule and this rule continues to be applicable far beyond § 104(a)(2).

ii. Ambiguity.

The Courts have applied conflicting standards for determination of whether this section is ambiguous and arrived at different results. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 4, 10-16; *Petitioner's Brief* – Keliy M. O'Gilvie, pages 20-24; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 13-15.) The ambiguous language remains: "any damages . . . received on account of personal injuries." The 1996 Amendment does

not resolve the question of whether the statute is plain, as the courts found in *Schleier, supra;* and *Horton v. Commissioner,* 33 F.3d 625 (6th Cir. 1994); or ambiguous as the appellate courts found in *Miller, supra; Wesson, supra; Hawkins, supra;* and *O'Gilvie, supra.*

iii. Two Tests from the Same Language.

The two individual tests illogically derived by the various courts from that ambiguous language are unaltered: 1) Treasury Regulation § 1.104-1(c) test; the "nature of the underlying claim," and 2) the "nature of the damage award." One of these tests is applicable to all damages received not only upon the Petitioner's claim for the death of his Wife here, but also to damages awarded in all future claims for tort or tort-like injury. Which test is proper is the issue. If the taxpayer must meet both tests, then the second test, the "nature of the damage award," which had been repeatedly rejected by the *Threlkeld v. C.I.R.,* 848 F.2d 81 (6th Cir.); line of cases has been approved, and the *Threlkeld* line of cases is logically, if not judicially, overruled. (See discussion *Petition for Certiorari* – Kelly M. O'Gilvie, pages 18-20; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 17, 19, 30-31; and *Petitioner's Reply Brief,* page 16.) This very timely issue derives from the question of the proper test to apply and has been reopened by these recent cases, notably *Schleier, supra.* The adoption of the "nature of the damage award" test is not addressed by the 1996 Amendment and would remain an unresolved issue for future taxpayers. The question of two separate tests from the same language is an issue that is as relevant to interpretation of this

amended statute as it is to the interpretation of this statute under the facts of this case.

iv. Recent Decisions Wreak Havoc With Time Honored Methods of Statutory Construction.

The 1996 Congressional Amendment of § 104(a)(2) does not cleanse the law of improper and illogical rules of interpretation and construction articulated and applied in these cases. (*Miller, supra; Schleier, supra; Wesson, supra; Reese, supra; Hawkins, supra;* and *O'Gilvie, supra.*) These improper rules remain intact to further accumulate and obstruct our method of interpreting federal statutes. These cases uniformly fail to articulate any hierarchy or weighing of extrinsic evidence with regard to the intent of Congress. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 16-22; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 25-36; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 4-5, 11-12.)

a. Plain Language of Original Statute Ignored.

The rule of interpretation "that prior acts may be resorted to, to solve, but not to create, an ambiguity," *Hamilton v. Rathbone,* 175 U.S. 414 (1899), is entirely absent from the decisions. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 22-24; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 36-39; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, page 17.) What clearer evidence of the intent of the original Enactors than the words they wrote. All parties agree that the original statute had been reenacted without material change since

1918; yet no court which found ambiguity addressed the plain words of the original statute. This is true even though the question of the intent of the enacting Congress is offered as the fundamental question where the courts find ambiguity. (*Miller, supra; Schleier, supra; Wesson, supra; Reese, supra; Hawkins, supra;* and *O'Gilvie, supra.*) The 1996 Amendment has not altered the fundamental question of the intent of the Enactors and the answer to the question remains essential to the proper interpretation of the old and the amended statute.

The two independent clauses of the original statute have two distinct subject clauses: the first, "amounts received as compensation," and the second, "the amount of any damages." These two independent clauses have only the *object of a prepositional phrase* in common; "for **personal injuries or sickness**" in the first clause and "on account of **such injuries**" in the second. There is no conceivable reading of the statute that would permit the word "compensation" to modify any part of the second clause. The word compensation is inextricably bound to the words which precede it and is unavailable to modify the words which follow. And yet these very words of the original statute are given scant attention in the case law. Instead the decisions are dominated by speculations about "rationale" and the "underlying compensatory purpose." This issue of the intent of the original words remains in the amended statute as the basis for decision of which of the two competing meanings was intended by Congress.

b. Disregard of Extant Treasury Regulation.

The courts which have chosen to apply a "default rule" have either blatantly ignored Treasury Regulation 1.104-1(c) (e.g. *Miller, supra*) or dismissed that Treasury Regulation as merely an additional administrative requirement, (e.g. *Schleier, supra*). This Treasury Regulation is the articulation of one of the competing tests for exclusion in the amended statute. Because the IRS had no authority to issue a quasi-legislative regulation for this section, the IRS had no authority to impose an "additional administrative requirement." The finding of this Court in *Schleier* that the IRS made additional law is not consistent with statutory limit of authority of the IRS to make laws. The Treasury Regulation is an interpretive regulation only and is not permitted to be an "additional administrative requirement."

The improper characterization of this Treasury Regulation here is crucial to the interpretation of this statute as having only one or two tests, an issue of pressing relevance for interpretation of the old and amended statute.

c. Prohibited Interpretation by Title Predominates.

A primary rationale for the finding of an underlying compensatory purpose in *Miller, supra,* and progeny is the title and arrangement of § 104(a). This use of title for interpretation is prohibited by statute. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 25-27; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 39-43; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 10-12, 16-18.) The finding of an underlying compensatory purpose dominates the discussion in *Miller* and is controlling

the choice of the second test. The amended statute is still burdened with this misuse of title and arrangment to interpret and that misuse is determinative of the test.

d. Congressional Reenactments and Amendments of Statute Ignored.

The use of later enactments to clarify previous law is not prohibited as the IRS asserts. This use of later enactments has been approved and demonstrated in the case of *Hamilton, supra; United States v. Community TV, Inc.*, 327 F.2d 797 (10th Cir. 1964); and *Burke v. United States*, 504 U.S. 229 (1992); to clarify an ambiguous statute. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 16-21; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 25-36; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 4-5, 11-12.) While the admonition that "the view of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" is apt, that admonition goes only to the use of a later view for inference of intent of the enacting Congress and does not prohibit review of the statute for other purposes in appropriate circumstances.

The court is vested with the discretion to determine what extrinsic evidence might be brought to bear on the question of an ambiguous statute and what weight to give that evidence. There are other factors here that indicate that careful consideration should be given to the 1989 Amendment, and now 1996 Amendment, of this statute by Congress. The reenactments and amendments of later Congresses with the interpretation of the statute as limiting only the *type of claim* is not an attempt to infer

the intent of the Enactors, but are surely relevant to the question of Congressional approval of long standing administrative practice and approval of relevant case law. The interest of the public in a consistent and cohesive body of law is great and the power of the Congress to make law is predominant.

e. Interpretation of Intent by Resort to Speculation about Rationale.

In determining which of the two tests is correct, the courts have confused the rationale behind the writing of the words with the intent of the Enactors in the meaning of the words. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 22-24; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 36-39; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 10-11, 16-18.) The improper finding of a single rationale, i.e., return of capital strongly influenced the decisions of the courts with regard to the question of which of the two tests to apply. This question also remains an issue in the statute after the 1996 Amendment.

f. Summary.

The cases have been dominated by a method of interpretation of a federal statute that requires application of a "default rule" when the statute is on its face ambiguous. This improper application of a "default rule" is potentially relevant to interpretation of each and every federal statute and cannot stand. The methodology that favors the government so strongly with a "default" rule will have the power of river to erode citizens rights granted

by Congress and believed to be etched in stone. The methodology exhibited in the cases leading to this *writ* is so piece-meal and helter-skelter that lower courts have no guide for decision-making.

A review of these cases reveals that there is no discernible or predicable system for interpretation. The principles of statutory construction are in dynamic flux. Like a glacier that has begun to move after a millennium, what was believed to be frozen solid for all time has come loose. An inviolate principle has collided with modern necessity. The principle requiring interpretation of statutory law as the enacting Congress intended is conflicting with the necessary modern policies to make statutory law easy to administer by agencies and to reduce the burden on the court system of the time consuming, maze-like analysis of "intent" that has clogged the courts.

The opportunity for a broad review of the method of statutory interpretation is rare. For as critical and determinative as the underlying method is, the method is not the usual topic of review. Instead the result or outcome is the focus of the inquiry and the details of statutory construction are mere addendums. This case with all its errors offers the unparalleled opportunity to re-examine and properly order the principles and the hierarchy of statutory interpretation at a time of exceptional relevance. A more appropriate case for focusing upon the fundamentals is unlikely.

The same underlying method of construction and interpretation of this statute will yield the correct answer for the issues raised by Petitioner's case and for future taxpayers seeking the protection of this statute.

IV. Impermissible Expansion of Judicial Authority to Modify Judgments – F.R.C.P. 60(a).

With regard to the F.R.C.P. 60(a) issue of the Petitioner, the 1996 Amendment has no relevance. The Petitioner has already throughly argued the application of the Federal Rules of Civil Procedure law to show that the IRS did not file its notice of appeal timely. If the Judgment of November 30, 1993 was amended under Rule 60(a), then there was no tolling of the time in which to file the notice of appeal. No motion was made that the Judgment be amended. This is certain. The Judgment was *amended* by the district court. That is certain. There is no Federal Rule except Rule 60(a) under which the district court had authority to amend a Judgment on its own motion. The district court must have amended its Judgment under some authority outside the Federal Rules of Civil Procedure, or the IRS did not timely file their appeal.

Respectfully submitted,

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